IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 499 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ASHVINBHAI NAGDAN JINJUWADIA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 499 of 2002

MS SADHANA SAGAR for Appellant

MR PRADIP D BHATE, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 23/09/2004

ORAL JUDGEMENT

1. This Appeal is preferred under Section 374(2) of the Code of Criminal Procedure against judgment and order delivered by learned Sessions Judge, Junagadh, on 16th of

January, 2002, in Sessions Case No. 117 of 1999, whereby present appellant was convicted for the charges proved against the appellant under Section 363 of the Indian Penal Code and was sentenced to undergo two years rigorous imprisonment and fine of Rs. 2,000, in default, to undergo six months simple imprisonment, for the charges proved against appellant under Section 366 of the Indian Penal Code and the appellant was sentenced for rigorous imprisonment of five years and fine of Rs. 3,000/- in default to undergo simple imprisonment of six months, for the charges proved against him under Section 376, he was sentenced to undergo rigorous imprisonment of 7 years and to pay fine of Rs. 10,000/in default to undergo simple imprisonment of one year. It was further directed by the learned Sessions Judge that this amount of fine of Rs. 10,000/- on recovering, to be compensated to victim having regard to the facts and circumstances under which the incident had occurred. The learned Secessions Judge also directed that all the sentences inflicted shall run concurrently, and the period for which appellant was in custody during trial, shall be given in set off.

2. It is required to be noted that in pursuance of observations of the Apex Court in the matter of STATE OF PUNJAB vs.RAMDEV SINGH as reported in AIR 2003 SCW 6947, in this judgment name of the victim girl is not published and is referred as victim.

3. The present incident occurred on 26th of February, 1999 at village Manekwada. The parents of victim belong to that village. During night hours of 26th of February, 1999, appellant enticed and induced victim, who was aged about 14 years, to go with appellant and appellant also induced victim to steal Rs.2,000/- in cash, ornaments of gold amounting to Rs.5,700/- from the house of her father. Appellant was residing just opposite the residential house of the family of victim and was distant relative. Appellant used to visit the house of the victim frequently. On disappearance of the victim from the house, her father Najabhai Virabhai Zinjuwadia searched everywhere and informed relatives. He also informed Mer Meru Bhurabhai and Govind Sardul, who were relatives of the father of the victim. When the house of appellant was searched, it was found that the house was locked. Victim girl was studying in Std, X, and final examinations were fixed in near future. The father of the victim girl anticipated that till her examination, victim girl might return and, therefore, after waiting till examination he filed a complaint before Keshod Police Station, on 16th of March, 1999 at

19.45 hours. This complaint was recorded by Surmaji Nemani Barot, the then PSO of Keshod Police Station and investigation was entrusted to PSI Indrasinh Natvarsinh Jadeja. Initially the complaint came to be lodged for the charges under Sections 363, 366, 380 and 114 of the Indian Penal Code against the appellant as well as against victim girl. On 11th of April, 1999, victim girl presented herself before the Investigating Officer at Keshod Police Station. According to her say, her date of birth was 1st of June, 1984 and she had two sisters and two brothers. At the time of the incident, she was studying in Std. X at Nagdevata Vidyamandir, Manekwada. Appellant was staying just opposite their house. He was doing work of driving. Appellant fell in her love. They used to see each other. This fact was thereafter known to her father and her father had scolded her. Her father had persuaded her that what was she doing, was not good for her. She conveyed to the appellant that she was scolded and was beaten by her father. Appellant on hearing this, enticed and induced her to run away from the house and on the day of the incident i.e. on 26th of February, 1999, at night when she was reading in her house, at about 1.30 hours, appellant called her and persuaded her to run away. According to her, he seduced her by promising that of marriage. It was also said by the appellant that after performing marriage, they would go much far away. She had put on dress and after obtaining cash of Rs. 2,000/from the shirt of her father and with golden ornaments, which were put on her body, they on foot went to village Timsa, and ultimately reached to village Chhatrasa. They found one taxi and in the said taxi, they went upto Upleta. From Upleta, both of them went to Rajkot. At Rajkot, appellant who was previously doing labour work and, therefore, appellant intended to stay at Rajkot. Victim girl, according to her, was taken to Mavdi plot where appellant rented a house of one Masabhai Bharvad, and in the said house she was staying with appellant. There were some cash amount with them and from restaurants they used to bring their meals. Appellant was doing labour work while she was doing household work. During the stay at Rajkot, without consent and against her will, appellant committed rape on her. This physical contact was frequented by appellant. While she was refusing to obey, appellant was enticing her to have intercourse with him. At times, she was also beaten by the appellant. They stayed at Rajkot for about one and half months. Thereafter, appellant came to know about the complaint filed by father of the victim girl at Keshod Police Station and they apprehended action by Police. The appellant, therefore, persuaded her that both of them should surrender before the Police at Keshod

and, hence, she presented herself at Keshod Police Station on 11th of April, 1999 before Investigating Officer PSI Indrasinh Natvarsinh Jadeja.

4. Investigating Officer Indrasinh Natvarsinh Jadeja recorded the statement of victim girl, and she was sent to Keshod hospital with police yadi. A panchnama of physical condition of victim girl was drawn, and clothes put on her were seized in the presence of panchas including ornaments of gold. At Hospital, Keshod, she was examined by Dr. Minaxiben on 12th of April, 1999 and she stated in her history that rape was committed on her. She also stated that she stayed with the appellant for about two months and appellant had committed intercourse with her for about 10 to 12 times. On examination, Dr. Minaxiben found that hymen of victim girl was ruptured but since no facilities were available in Keshod Hospital for collecting Saliva, etc. she was referred to Civil Hospital at Junagadh. Appellant was also presented himself before the Investigating Officer at Keshod and Investigating Officer arrested him vide panchnama at Exh. 42. Clothes put on by the appellant were seized and he also was sent to the Medical Officer, Keshod Hospital and was examined by Dr. Minaxiben. The appellant was also examined by Dr. Minaxiben and he stated in his history that he stayed with victim girl for about two months and committed intercourse with her for about 10 to 12 times. According to Doctor he was capable of performing intercourse. Though no external injury on the body was found, he was also referred by Dr. Minaxiben to the General Hospital.

5. At General Hospital, appellant was examined by Dr. Bhalchandra Narmadashankar Joshi on 13th of April, 1999 with police yadi and reference note of CHC, Keshod. Dr. Bhalchandra Joshi found minor injury on private parts of appellant and on inquiring, appellant stated that he had committed intercourse with victim girl for about 6 to 7 times. He was found capable of performing intercourse. From him, specimen of blood, semen, saliva, pubic hairs, urethral smear, etc was collected by him, while victim girl was examined by Dr. Laxmiben Karmul, Medical Officer, Civil Hospital, Junagadh. There also, victim girl narrated the history that she had ran away with appellant. Dr. Laxmiben found that her hymen had a cut and her secondary sexual character were fully developed. From her body, blood sample, saliva, pubic hairs and urethral and vaginal smears were collected and sent to the Police. In turn police along with mudammal sent all the above samples to Forensic Science Laboratory for analysis and opinion. According to Dr. Laxmiben,

Ossification test was also conducted, of the victim girl, by Dr. Patiwala and accordingly she was found to be aged about 16 to 18 years.

6. During investigation, when it was disclosed that an offence under Section 376 of the IPC is also committed by appellant, a charge sheet for the offence punishable under sections 363, 366, 376 and 380 and under Section 114 of the Indian Penal Code was submitted before the learned Judicial Magistrate, First Class, at Keshod, by Police. In turn, the case came to be committed to the court of Sessions at Junagadh where it was numbered as Sessions Case No.117 of 1999.

7. Charge for the above said offences was framed against appellant vide Exh. 1 on 15th of May, 2001, by learned Sessions Judge, Junagadh, to which appellant pleaded not guilty.

8. To prove its case, the prosecution examined as many as 18 witnesses.

9. PW-1 Dr. Bhalchandra N.Joshi, who is examined at Exh. 10, has examined the appellant as aforesaid as Medical Officer of Junagadh Civil Hospital and testified that the appellant was capable of performing intercourse and there was abrasion injury on the private part of the appellant. He is cross-examined, wherein he has stated that some times injuries are found on the body of a male while committing rape on female. He has stated that in all cases, it is not necessary that such injuries are found on the body.

9. PW-2 Exh. 16 Dr.Laxmiben Karmul as Medical Officer of Junagadh Civil Hospital examined victim girl and as aforesaid, she found that hymen of the victim girl was ruptured and that according to ossification test, the victim girl was aged about 16 to 18 years. In her cross-examination, she admitted that there was no injury marks on the body of the victim girl. She also admitted that victim girl was habituated to intercourse. She also stated that by margin of error, victim girl might be of 18 to 20 years.

11. Both of the above witnesses submitted Medical Certificates, vide Exh. 30 and Exh.19. Ossification Test Certificate is also produced at Exh. 24.

12. PW-3 Najabhai Virabhai Jinjuwadia, father of the victim girl, is examined at Exh. 26. He stated that the appellant was staying opposite their house, and was son

of his distant cousin. Victim girl was his daughter, and was studying in Std.X. On the night of 26th of February, 1999, he found victim girl was missing and thought that since the examination of Std.X was reaching near, she would return, but she did not return and, therefore, he filed the First Information Report, which is at Exh. 27 on 16th of March, 1999 and before that, he also attempted to search victim girl amongst relatives and other places. He has been cross-examined at length about the age of the victim girl, wherein he stated that they had other children, but the date of birth of other children could not be remembered by him, but the date of birth of the victim girl was 1st of June, 1984, though he stated that he did get registration of birth of victim girl in the register maintained by Manekwada Gram Panchayat.

13. PW-4 Merubhai Bhurabhai examined at Exh.29 and PW-5 Govindbhai Sardubhai examined at Exh. 30, are the witnesses examined by the prosecution to prove the fact that after disappearance of victim girl, her father talked to both these witnesses and requested them to assist him in searching. However, both these witnesses have turned hostile and did not support the prosecution case. Their evidence is not material. PW-6 Jagadishbhai Bhupatbhai is examined at Exh. 37, who is panch of panchnama at Exh.38, in whose presence, the clothes put on by victim girl were seized, but this witness did not support the panchnama and turned hostile. PW-7 Baburav Ganapatrav Manik is examined at Exh.39. He is the witness, who was called as a panch of panchnama at Exh.40 by which ornaments seized from victim girl were weighed, but this witness has not supported the prosecution case. PW-8 Exh.41 Ashishkumar Jayantilal is also examined as panch of panchnama at Exh. 42, by which the appellant was arrested, and his clothes were seized by the Police, but this witness also did not support the prosecution case. PW-9 Madhavjibhai Mepabhai is examined at Exh. 43, who is second panch of panchnama at Exh. 42, and he also did not support the prosecution case.

14. At Exh.44 victim girl is examined as PW-10. She stated that her date of birth was 1st of June, 1984. She was studying in Std. X at Nagadevata Vidyamandir, Manekwada. She came in contact with appellant, who was a distant relative, and was doing the work of driving vehicle. Appellant enticed her by promising marriage, to run away from her house, and ultimately they on the day of the incident at about 1.30 hours at night went to Rajkot with cash amount she took out from the shirt of his father and with ornaments she had put on her body. She and appellant went to Rajkot, rented a house and

stayed there for one and half month where the appellant committed rape on her without her will and consent. When appellant came to know that a complaint has been filed against them, he persuaded her to present herself before Keshod Police Station, and she presented herself accordingly before the Investigating Officer at Keshod Police Station on 11th of April, 1999. She was examined by Medical Officer at Keshod Hospital as well as Junagadh. At Exh.28, she produced on record the certificate of her date of birth issued by her school Navgdevta Vidyalaya, Keshod . She has been extensively cross-examined by the defence. She admitted that she was in love with the appellant and had written some letters, which were produced at Exhs 45 to 62. The questions which were indicating that she submitted herself to appellant with her free consent were repeatedly asked but appellant denied this fact. She has been extensively cross-examined by the defence as to love affairs between the victim girl and the appellant, but the victim girl has withstood the cross-examination admitting love affairs, and emphatically denied that she ever intended to marry appellant and only on inducement and enticing by appellant she had gone with him at Rajkot. She denied that she wrote letters to appellant for marrying her. In cross-examination one writing, styled as agreement, has been produced at Exh. 63. If the contents are taken into consideration, indicates that victim girl consented to stay with appellant and to perform household work, and in consideration, appellant agreed to pay her Rs.500/- per month. Victim girl, in her cross-examination, though admitted her signature at Exh.63 agreement but stated that the signature was subscribed by her at the instances of appellant. In paras 5 and 6, contradictions in her police statement are asked extensively. None of them are material to affect the prosecution case but it is worth nothing that she admitted that in her police statement she stated that with her free will she joined in the act of intercourse with the appellant.

15. As PW-11 at Exh. 64 mother of the victim girl Nanduben is examined. She stated that her daughter disappeared on the day of the incident and that appellant had enticed her. On returning home on inquiry victim girl stated before her that appellant had enticed her and had raped her. She has been cross-examined in detail particularly about the time gap of the birth of her children, and the date of birth and age of children. She stated that she could not give with certainty such details.

16. As PW-12 Exh. 68 Dr. Minaxiben Bhanajibhai

Makwana has been examined, who in first point of time i.e. on 12th of April 1999, examined victim girl as well as appellant. She found that sexual intercourse was performed by victim girl, and victim girl gave history that she stayed with appellant for about two and half months, and during this period, the appellant committed rape on her for about 10 to 12 times. She was referred to Junagadh Hospital, as stated above. She also examined the appellant and noted the history stated by the appellant that he stayed with the victim girl for about two months, and had performed sexual intercourse with her for 10 to 12 times. Dr. Minaxiben was cross-examined extenso but nothing could be brought about to disbelieve her testimony. The certificates produced by her are at Exh.70 and Exh. 73.

17. PW-13 Labhubhai Mohanbhai Sindhav is examined at Exh. 77, who happened to be Talati of Manekwada Gram Panchayat, and he produced a copy of the entry of the register of Birth & Death maintained by the panchayat for period from January to December 1994. According to him, on 18th of January, 1984, the birth of a female child, whose parents were Najabhai and Nanduben, was recorded in the said register and the date of birth of the said female child was 18th of January, 1984. Father Najabhai has signed the entry. This witness has produced a copy of the same at Exh. 78. In examination in cross, he denied that Najabhai did not register any birth, as stated by him. He admitted that the writing of the entries were of earlier talati Mr. Rupateliya, whose hand-writings he could identify. So, nothing could be brought about in the cross-examination of this witness also, to doubt the case of the prosecution.

18. PW-14 Bhikhabhai Nathabhai, is examined at Exh. 79 being Headmaster of Primary School at Manekwada. He had brought register of the school and form, which was required to be filled-in by guardians/parents of students. Accordingly, the victim girl was admitted to primary school on 30th of September, 1989 and her date of birth was recorded as 1st of June, 1984, along with the statement of her father that by memory he gave the date of birth of the victim girl. The entry of this register is produced at Exh. 80. This witness is also cross-examined in detail, wherein this witness was confronted by the statement of the father of the victim girl where father of the victim girl stated that in government records entries were not made in respect of birth of victim girl. Except that, nothing could be brought about in his cross-examination.

19. PW-15 Kishorebhai Navalbhai Joshi is examined at Exh.82 as he was Principal of Intermediate School, Manekwada, known as Nagdevata Vidyamandir, and he produced on record at Exh. 83 a copy of the extract of the register, in respect of victim girl, where her date of birth was recorded to be 1st of June 1984. This entry, according to him, was made from the entry made in the Register of Primary School of Manekwada.

20. PW-16 Surmaji Nemaji Barot is examined at Exh. 86. He was Police Station Officer of Keshod Police Station, on 16th of March, 1999 and recorded the complaint of the complainant. He registered the offence and handed over the investigation to PSI Indrasinh Natvarsinh Jadeja. Investigating Officer - PSI Indrasinh Natvarsinh Jadeja is examined as PW-17 at Exh. 90. He almost completed the investigation, and was transferred on promotion and, therefore, investigation thereafter was entrusted to PW-18 Lakhdhisinh Navalsinh Jethva, Exh. 94, who after obtaining necessary certificates, submitted the charge sheet.

21. This is all the evidence of the prosecution.

22. After evidence was over, statement of appellant was recorded under Section 313 of the Criminal Procedure Code, where he took the defence of total denial and denied to examine defence witnesses, and stated that a false case was filed against him. After hearing the parties, the learned Trial Judge after appreciating the evidence, came to the conclusion that the age of the victim girl was below 16 years from the evidence of parents of the victim girl and other documentary evidence produced on record. The learned Trial Judge also came to the conclusion from the evidence of victim girl and other medical evidence that victim girl as well as appellant were staying together, and appellant performed sexual intercourse with victim girl. Since victim girl was below the age of 16, she was enticed and induced, coupled with the promise of marriage and, therefore, the Trial Judge found the appellant guilty under Sections 363, 366 and 376 of the Indian Penal Code and sentenced him accordingly.

23. Learned Advocate for the appellant Ms.Sadhana Sagar vehemently urged that, according to the evidence of Dr. Bhalchandra, PW-1 Exh. 10, Ossification test was conducted in respect of victim girl, and accordingly she was found about 16 to 18 years of age. My attention was drawn to the cross-examination of this witness, wherein the witness admitted that by margin of error, the victim

girl might be of 18 to 20 years. Relying on this, it was vehemently urged that according to Ossification test, the victim girl was fully developed, and was aged about 18 to 20 years and not below 16. It was vehemently urged drawing the attention of this court on the cross-examination of the parents of the victim girl as well as of the victim girl that victim girl admitted having love affairs with the appellant. My attention was drawn to the letters written by the victim girl to the appellant. It was urged that from these facts and the circumstances, it can clearly be deduced that the victim girl, by her free will, accompanied with the appellant, and run away. It was urged that there is no evidence, therefore, that the appellant enticed and induced the victim girl with a promise of marriage to leave the house. My attention also was drawn to the cross-examination of victim girl, wherein it was asked that in her police statement she stated that with her free will she joined with appellant in the act of intercourse. Though she denied to have stated so before the police, but through the evidence of Investigating Officer, PW-17, Indrasinh Natvarsinh Jadeja, it is proved that she stated before the Police that she committed or submitted to intercourse by her own will. Therefore, it was vehemently urged that if at all the court comes to the conclusion that the appellant had performed sexual intercourse with the victim girl then, the same was with the consent of the victim girl, and victim girl was willing party to it. In this respect it was urged that the letters written by her to the appellant as well as previous lover affair, is required to be considered. It was also urged that after the incident which occurred on 26th of February, 1999, a complaint came to be lodged by father of the victim girl only on 16th of March, 1999 at about 19.45 hours. There is delay of about 17 days in lodging the complaint. This delay is not explained by the witness properly. It was urged that, this is so because the love affair between the appellant and victim girl was well known to the parents of the victim girl, and they were aware that the victim girl with her consent, had run away with the appellant. It is urged that, therefore, the delay caused in filing First Information Report is fatal to the prosecution case. Ultimately, it was urged that the appellant is in jail since the date of his arrest, and has not been released either on furlough or on temporary bail any time before, it was urged that, if the court comes to the conclusion that the conviction is proper, then, sentence is required to be reduced, in the facts and circumstances of the case as well as having regard to the age of the victim, which is about 20 to 29 years today.

24. Learned APP Mr. Pradip D. Bhate, supporting the judgment and order under challenge, drew attention of this Court to the witnesses i.e. PW-13 Labhubhai Mohanbhai Sindhav, who produced at Exh. 78 the extract of birth register; PW-14 Bhikhalal Nathabhai, Exh. 79, who produced at Exh.80 the extract of primary school register, and PW-15 Kishorebhai Navalbhai Joshi, who produced the extract of intermediate school register at Exh. 85, in respect of the victim girl, and contended that, by these documentary evidence and the government records, it is amply established that the victim girl was below the age of 16 years at the time of incident. It was urged that, true it is that, in the panchayat record, date of birth of the victim girl is recorded as 16th of January, 1984, while in school register, the date is recorded to be 16th of June, 1984. It was urged that in any case, taking any of the dates recorded in Government records or registered in school registers, the victim girl would have been less than 16 years of age at the time of incident. My attention was also drawn to the evidence of PW-1 Dr.Bhalchandra N.Joshi, wherein he stated that according to Ossification Test, the age of the victim girl might be of about 16 to 18 years. It was urged by learned APP that Ossification Test conclusions are always subject to the margin of error, either two years upward or two years downward, and if two years margin of error downward is taken into consideration, the age of victim girl might be of about 14 years. It was also urged that by the evidence of victim girl, it is amply proved that she was subjected to forcible intercourse by the appellant at Rajkot and nothing could be brought about by the defence in cross-examination of any of the witnesses to doubt the prosecution case and, hence, this fact stands established. It was contended that therefore the Appeal deserves to be dismissed.

25. I have carefully gone through the evidence of each of 17 witnesses as well as the documentary evidence produced by the prosecution on record. To consider the rival contentions along with the findings of the Trial Court, it is utmost necessary, first to find out by re-appreciating the evidence about the age of victim girl that at the time of commission of offence whether victim girl was below the age of 16 years. Learned Advocate for the appellant heavily relied upon the deposition of PW-1 Dr. Bhalchandra, wherein in his examination in cross, he stated that considering the margin error of Ossification Test, the age of the victim girl, might be of 18 to 20 years. This argument is based on Ossification Test conducted on victim girl, at the Civil Hospital,

Junagadh, wherein as per the opinion of Dr.Patiwala, according to PW-1 Bhalchandra, the age of the victim girl was about 16 to 18 years. In this respect, at the outset, it is necessary to observe that Ossification Test is not the surest test to determine the age of a person. The result of Ossification Test is subjected to marginal error of two years upward and two years downward. When Radiologist opines as to the age, the result may be, the age could be two years lesser than the result, or two years more than the result of Ossification test. In such circumstances, it is always necessary to look into the other evidence deciding the age of victim girl. Having gone through the matter entirely, it appears that to come to the conclusion as to the age of victim girl, PW-13 Labhubhai Mohanbhai, PW-14 Bhikhalal Nathabhai, and PW-15 Kishorebhai Navalbhai Joshi, along with the parents of victim girl and victim girl herself are the necessary witnesses. Father of the victim girl, PW-3 Exh. 26 Najabhai Virabhai, emphatically stated in his deposition that the date of birth of victim girl was 1st of June, 1984. He placed reliance upon school leaving certificate of the victim girl. When his evidence is appreciated along with other documents, and above said witnesses, it clearly appears that, so far as the say of the father is concerned, the same is amply corroborated. The prime evidence about the age of the victim girl, which is led by the prosecution is, in shape of the entry made in the Panchayat Register of Manekwada Gram Panchayat. Material witness PW-13 Labhubhai Mohanbhai produced on record the entries of register kept by gram panchayat for birth and death for the period from January to December, 1984. A birth of a female child, whose parents were PW-3 Najabhai Virabhai and PW-11 Nanduben, was duly registered at Entry No.2 of the said register, which is produced at Exh. 78. Entry on the said register bears the signature of father of the victim girl. In his cross-examination, nothing is brought about to disbelieve this official record kept under a statute. This entry and the deposition of Labubhai Mohanbhai Sindhav, PW-13, leaves no room for doubt that at the relevant juncture in 1984, birth of victim girl was recorded in the relevant register, kept by the Gram Panchayat under a statute. From the defence side, nothing could be indicated that why reliance should not be placed upon this weighty evidence. True it is that, as per the customs amongst Hindu, the child which is new born, may not be named on the date the birth takes place but named after some days. So, in the present case also, the name of the victim girl is not entered in the register, but the circumstances, undoubtedly, leads to the only conclusion that the birth, which was registered of a female child, vide Exh. 78, was the birth of

none-else but only of the victim girl. This fact is more corroborated by other two witnesses PW-14 Bhikabhai Nathabhai, Headmaster of Primary School at Manekwada, who produced relevant form filled-in by father of the victim girl, and necessary entries from the register kept in school vide Exh. 81 and 80. When victim girl started her career as a student, it was necessary to make declaration before the school authority about her correct date of birth. True it is that, there the date of birth of the victim girl is shown to be 1st of June 1984, and apparently, this appears to have been recorded to show the victim girl bit younger, so she could start schooling. It is also true that, in his declaration before the school authorities, the father of the victim girl declared that he did not get register the birth of victim girl anywhere else, but this fact itself would not destroy the prosecution case which is based on record of statutory authority. In the record of gram panchayat, at relevant time, the entry was made. One cannot expect that, father of the victim girl after years would vividly remember that the birth was registered earlier before the authorities. The register kept by panchayat must be given due weightage in evidence, especially when, nothing is alleged against such evidence, as to declare the evidence to be not worthy of credit nor anything is on record to denote that such record was manipulated, nor anything could be alleged against this witness. Having appreciated the evidence in this manner, it is clear that the conclusion of the Trial Court as to the age of the victim girl, is eminently just. It is established beyond doubt that on the date of incident i.e. on 26th of February, 1999, the victim girl was, undoubtedly, below the age of 16 years.

26. Adverting to the main charges against the appellant, the evidence of the victim girl must be taken into consideration, because, the deposition of victim girl in cases of sexual offenses, is vital and unless there are compelling reasons, which insist looking for corroboration of a statement, the court should find no difficulty to act on the testimony of the victim of sexual assault alone to convict the accused. When the deposition of the victim girl inspires confidence, and is found to be reliable, seeking corroboration of her statement before relying upon the same, as a rule, in such cases, amounts to adding insult to injury. In this case, when the evidence of victim girl is appreciated, it clearly leads to only conclusion that a girl below the age of about 16 years, was induced and enticed to go with the accused, and run away from the house. It is established beyond doubt that having seduced and enticed

her, during their stay at Rajkot for about one and half months, the accused committed sexual intercourse with the victim girl. The learned Advocate for the appellant attempted to plead and advance a case of consent, but as said above, when from the overwhelming evidence, it is found that the victim girl is below the age of 16, the case of consent, as advanced by the defence, remains in oblivion. The way in which the defence has conducted the cross-examination of this witness, explicitly reveals that the accused - appellant was in acute proximity with the victim girl, which leads to the fact that she was seduced and induced and raped. True it is that, before in her police statement, victim girl stated that both of them enjoyed sexual relationship by free will, and such contradiction is proved through Investigating Officer but the bears no importance in view of clear statutory provision that even consent or free will of the victim girl below the age of 16, would amount to, no consent at all. If the case is viewed and the evidence is appreciated, as above said, then, the case of rape upon a girl, below the age of 16, is proved beyond reasonable doubt. Nothing could be indicated by the defence in this respect that when it is established that the victim girl is below 16, then how the case of prosecution proved by the evidence, could be disbelieved. The charges of rape against the appellant is proved not only through the evidence of prosecutrix alone, but the evidence of prosecutrix is amply corroborated by other evidence. Firstly, the prosecutrix is amply corroborated by medical evidence of PW-12 Dr. Minaxiben Exh. 68, who examined the victim girl in first point of time soon after she presented herself before Keshod Police Station. She was found by Dr. Minaxiben to have had physical intercourse. In history, she stated that she was raped by appellant. The victim girl is further corroborated by Dr. Laximben, PW-2, who examined her at Junagadh Civil Hospital who collected saliva, etc. from the body of victim girl. Dr. Laximben also found that hymen of victim girl had tear and she had undergone sexual intercourse. The case of the defence particularly in further statement of the appellant is of total denial while alternative defence is attempted is of consent in cross-examination if the girl is found of above the age of 16 years. Beside, the above thumbing evidence of victim girl, as corroborated by medical experts, very important evidence against the appellant is his own admission of guilt, which may be branded as extra judicial confession. It is found from the appreciation of evidence that before Dr. Minaxiben PW-12 Exh. 68, the accused appellant who was sent by Keshod Police Station, stated in history that he had committed rape on victim girl. This is evident by the

evidence of PW-12 Dr. Minaxiben as well as the certificate produced by her at Exh.70. Going through carefully this evidence, it is found that this fact is not challenged in cross-examination, resulting in unchallenged evidence of prosecution side as to the history given by the appellant before a Doctor, who examined appellant soon after he presented himself before Keshod Police Station. In this view of the matter, there could not be more reliable evidence than led by the prosecution in this case and as appreciated above, to bring the charges home and to convict the appellant.

27. The other contention which was raised by learned Advocate for the appellant was in respect of late filing of FIR by the father of the victim girl. True it is that, the incident took place on 26.2.1999 and the First Information Report came to be filed only on 16.3.1999, and that too, for offences punishable under Sections 363, 366 and 380 of the Indian Penal Code. Evaluating this contention, with reference to the facts of the case, as well as evidence produced on record, the law in this respect must be taken into consideration. In rape cases, delay in lodging FIR must be appreciated on broad probabilities. A judge of facts must apply common sense law and prudence of ordinary human while testing the reasonability of the prosecution case. None-the-less, it is to say that reputation of unmarried female is always at stake in filing of complaint for rape. Having regard to the social condition in this country, undoubtedly, all concerned, before filing such complaint, would first consider all the pros and cons and some delay is natural to occur in such cases. PW-3 Najabhai Virabhai, father of the victim girl, in his deposition, has made it clear that the appellant was son of his distant cousin. He, therefore, instead of going to police, searched the victim girl at the places of relatives and other places which is absolutely natural conduct of a father in such circumstances. Not only that, it is also made clear by PW-3 Najabhai, father of the victim girl that he anticipated that examination of Std.X which was reaching in near future, might provide cause for the victim girl to return and resume, but even after the reaching of examination, victim girl did not return and thereafter First Information Report came to be filed by him. In the above mentioned circumstances, it is clear that the contention that the First Information Report was filed late, must not find any favour.

28. From the above discussion and appreciation of evidence, I come to the conclusion that the findings of the Trial Court, convicting appellant for the charges

proved against him under Sections 363, 366 and 376 of the Indian Penal Code are eminently just and proper. The sentence awarded by the learned Trial Judge, which is minimum prescribed by the statute particularly for the charges under Section 376 of the Indian Penal Code, is also just and proper and requires no interference, except it is contended by learned Advocate for the appellant that the appellant is very poor and has no means at all for even livelihood. In these circumstances, it was earnestly urged that the amount of fine, which is imposed by the learned Trial Judge be modified and reduced to reasonable extent. Except this submission about reduction of amount of fine, rest of the Appeal of the appellant stands dismissed including about quantum of substantive sentence. Only interference in reduction of fine is made as mentioned under :

The learned Trial Judge has imposed fine of Rs. 2,000/- for the offences proved under Section 363 IPC against the appellant and in default to undergo simple imprisonment of 6 months is reduced to Rs.500/- and in default to undergo RI of three months.

The learned Trial Judge has imposed fine of Rs. 3000/- and in default to undergo simple imprisonment of six months for the offence proved against the appellant under Section 366 IPC and the same is modified and reduced to the extent that fine of Rs.500/- is imposed upon appellant and in default the appellant shall undergo RI of three months.

A fine of Rs.10,000/- is imposed against the appellant and in default to undergo SI of one year for the offence proved against the appellant under Section 376 IPC. This amount of fine is also reduced and modified to the extent that the appellant shall pay fine of Rs.4,000/- and in default to undergo RI for three months.

As directed by learned Trial Judge, the amount of Rs.4,000/- imposed for the offence under Section 376 IPC, if recovered, be paid to victim girl by way of compensation.

Except the above modifications in the amount of fine imposed, rest of the Appeal of the Appellant stands dismissed."

(J.R. Vora, J.)

p.n.nair